**IN THE HIGH COURT OF JUDICATURE AT BOMBAY**
**CIVIL APPELLATE JURISDICTION**
**FAMILY COURT APPEAL NO. 110 OF 2002**

Anita Omprakash Agarwal, ]
an adult, Hindu, Indian ]
Inhabitant of Mumbai, ]
Aged about 35 years, ]
Occupation Housewife, ]
presently residing at ]
C/o. Shri. Govind Prasad ]
@ Babubhai Jain, Jain Estate, ]
Jakaria Road, Malad (West), ] ...Appellant
Mumbai 400 064 (Ori. Petitioner)

Versus

Omprakash Ridhkaranji Agarwal ]
an adult, Hindu, Indian ]
Inhabitant, Aged about 40 yrs, ]
Occ. Business, Industrialist, ]
earlier residing at ]
"Shradha" 56, Chandravali ]
Society, near Jain Temple, ]
Kareli Baug, Baroda, ]
Gujrat State and also ]
now residing at "Madhav", ]
C/30, Balaji Nagar, ]
Kareli Baug, ]
Baroda (West), ] ...Respondent
Gujrat State (Ori. Respondent)

.....

Mr. R.M. Agarwal with Mr. I.P. Bagaria with Mr. Girish Bagaria, counsel for Appellant

Mr. Pankaj Bhatt, counsel for Respondent.

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**CORAM: DR. S. RADHAKRISHNAN AND**
**SMT. V.K. TAHILRAMANI, JJ.**

**DATE OF RESERVING**
**THE JUDGMENT : 20.12.2005**

**DATE OF PRONOUNCING**
**THE JUDGMENT : 14.02.2006**

**ORAL JUDGMENT (PER SMT. TAHILRAMANI, J.):-**

1. The Appellant/wife has filed the present Appeal against the judgment and order dated 20.8.2002 passed by the learned Principal Judge, Family Court, Mumbai in Petition No.A-972/95. By the said judgment and order, the petition of the applicant came to be dismissed. In the said petition, the Petitioner i.e. present Appellant had prayed for decree of nullity on the ground of non consummation of marriage or in the alternative for decree of divorce on the ground of cruelty. The Appellant had also prayed for maintenance.

2. It is the case of the Appellant that a proposal for her marriage with the Respondent was sent through a friend by Appellant's father to the Respondent. Thereafter, the Appellant and Respondent got engaged on 31.10.1993. On 29.11.1993 the Appellant and Respondent got married at Malad, Mumbai according to Hindu rites and customs of the community. After the marriage, they started residing together as husband and wife at Baroda (Gujrat) in a joint family. The couple has no issue out of the said marriage. These

facts are not disputed.

3. In the petition, the Appellant contended that the marriage was not consummated and she was treated with cruelty. These contentions were denied by the Respondent in his written statement. After going through the petition and written statement, the learned Family Court Judge framed the following issues:

1. Does the petitioner prove that her marriage with the respondent has not been consummated owing to the impotency of the respondent?

2. Is the petitioner entitled to a decree of nullity?

3. Does the petitioner prove that the respondent has treated her with cruelty?

4. Is the petitioner entitled to a decree of divorce?

5. Is the petitioner entitled to return of her articles?

6. Is the petitioner entitled to claim maintenance for herself from the respondent? If yes, what amount?

7) What order and decree?

4. Before the Family Court, the Appellant examined herself as P.W.1, her father Govind Jain as P.W.2, Arun Gadia who is the husband of sister of the Appellant as P.W.3 and Suman Jain who is the brother of the Appellant as P.W.4. The Respondent has only examined himself before the Family Court. After going through the evidence of the witnesses, written statement and other record, the learned Judge of the Family Court came to the conclusion that both these contentions i.e. impotency and cruelty, are not proved and the Petition of the Appellant came to be dismissed. The learned Judge of the Family Court further held that the Appellant is not entitled to claim any maintenance. Thus, the Petition preferred by the Appellant came to be

dismissed. Hence, this appeal.

5. We have heard the learned counsel for the Appellant and the learned counsel for Respondent. We have also perused the record as well as judgment and order passed by the learned Judge of the Family Court. Two grounds were raised by the Appellant i.e. non consummation of marriage and cruelty. We do not find it necessary to go into the first ground of non consummation as after carefully considering the matter, we are of the opinion that this appeal clearly deserves to be allowed on the second ground i.e. of cruelty.

6. In her evidence before the Family Court, the Appellant has stated that on the day of the engagement, the Respondent, his parents, his brother Shravankumar, his wife Savitadevi, met the father of the Appellant and demanded dowry of Rs.10,00,000/-. Due to this, tension mounted and the father of the Appellant came to be admitted in the hospital on the same day.

7. The Appellant has further stated that prior to marriage, on 27.11.1993, a ceremony called ‘Milani’

was performed. At that time silver utensils of about 15 K.G. and a sum of Rs.1,50,000/- was given as part of dowry to the parents of the Respondents. The Appellant has stated that there was continuous demand of dowry of Rs.10,00,000/- from the Respondent's side. They insisted upon the balance amount of dowry. The Respondent asked the father of the Appellant to book a suite in a Hotel for the first night. Accordingly, a suite was booked in Sun-n-Sand Hotel by the brother of the Appellant. However, the Respondent was not satisfied because he did not get the full dowry amount. The Respondent did not consummate the marriage on that night. Thereafter,the Appellant went with the Respondent's family to Baroda. There were no physical relations between her and the Respondent. On the say of the Respondent,the father of the Appellant made arrangement for the honeymoon. The father of the Appellant gave Rs.50,000/- to the brother of Respondent for booking Air tickets for honeymoon. Thereafter, the Appellant and the Respondent went for honeymoon where they stayed in a hotel. However, there were no physical relation between the Appellant and the Respondent during the honeymoon. The Appellant has stated that the

Respondent was abusing her in filthy language. In January, 1994, the father of the Appellant came to Baroda. As per the custom, her father had brought sweets and 100 kites. The sweets were given to the dog. Her father offered a saree to her mother-in-law but they said they wanted only money. The Respondent humiliated her father. On that day. The appellant stated that after her father left, the Respondent assaulted her.

8. The Appellant has further stated that on 18/20th January, 1994, her mother-in-law prepared some vegetable. Her mother-in-law put excess salt in it. When the Respondent had dinner on that day, he threw the said vegetable on the person of the Appellant and said that same should be given to her father. Thereafter, the Respondent assaulted the Appellant and she was driven out of the house at 2.00 a.m. The Appellant wanted to commit suicide but Kailash brought her back. The Respondent phoned her father and he asked her father to take her away immediately. On the next morning her father P.W.2 Govind Jain and her elder brother came by flight. The Respondent’s brother also came alongwith them. The father of the Appellant asked

the Respondent as to why the Appellant wanted to commit suicide. The Respondent said that he should asked that question to the Appellant. The Appellant narrated everything to her father. At that time, the Respondent said that the same thing will happen until the money was given.

9. The Appellant has stated that eight to ten days thereafter, the Respondent and Appellant came to Bhayander. Some quarrel took place between the Respondent and his brother. At that time, the Respondent said that as the father of the Appellant did not give him money, he had not paid money to his brother. On that occasion, at 12 O'clock in the night, the Appellant was driven out of the house by the Respondent and his brother. Both of them were drunk at that time. The Appellant came to Bhayander Railway station, she was thinking of committing suicide. At that time, Savita, wife of Shravankumar i.e. brother of Respondent brought her back. Thereafter, the Appellant told her father to pay money. However, her father told her that he was not having money and he would pay afterwards.

10. Thereafter, the Appellant has stated that she and Respondent went to Baroda. On the night of 7.3.1994, the brother of the Appellant Naresh was bitten by snake. The father and brother of the Appellant phoned the Appellant and informed the Appellant and Respondent about the same. The father of the Appellant asked the Appellant to come and see Naresh as Naresh was very serious. However, the Respondent said that he was not concerned with Naresh. Thereafter, Arun, husband of sister of the Appellant phoned the father-in-law of the Appellant, thereafter, the Respondent brought the Appellant to Malad. There, the Respondent insulted sister-in-law of the Appellant. The Appellant started crying. Suman, the brother of the Appellant asked her the reason for crying, thereupon, the Appellant told him everything. Her brother telephoned her father-in-law and asked him why they were behaving with the Appellant like that. Thereupon, the father of the Respondent i.e. father-in-law of the Appellant told that the same thing will happen until the money was paid.

11. The Appellant has clearly stated that, she was mentally as well as physically tortured and

therefore, she decided to take divorce from the Respondent as they are interested only in dowry. She has stated that there was no other reason for divorce. The Appellant has further stated that around mid March 1994, she was taken to her parents place by Shravankumar i.e. brother of the Respondent on the occasion of visiting her house as it was first "GANGORE" ceremony after her marriage. Till, 1995 she waited to go back to her husband's house, however, the Respondent did not come to take her back. Despite the lengthy cross examination, this witness has not been shaken on the aspect of cruelty meted out to her by the Respondent i.e. her husband. We find the evidence as far as the aspect of cruelty is concerned, to be cogent and worthy of reliance.

12. The evidence of the Appellant Anita is corroborated by the evidence of her father i.e. P.W.2 Govind Jain. He has also deposed that on the day of engagement i.e. on 31.10.1993, the Respondent's family demanded Rs.10.00 lakhs as dowry. He has corroborated the evidence of P.W.1 Anita. P.W.3 Arun Gadhit has stated that after 8/10 days of the marriage of the Appellant Anita

with Respondent Omprakash, the couple were going for honeymoon, Suman i.e. brother of the Appellant was with him and this witness was present when Rs.50,000/- in cash was given to Shravankumar i.e. brother of Respondent Omprakash. This witness has further stated that this amount was given as part of dowry. Arun Gadhit has further stated that 4/5 months after the marriage, he had gone to the house of Shravankumar. He had received a telephone call from Malad informing that Appellant Anita was beaten. Omprakash was asked as to why he beat Anita, whereupon Omprakash stated that until the full amount of dowry was paid, the same thing would continue.

13. Suman Jain i.e. brother of Appellant Anita is examined as P.W.4. He has stated that few days after marriage, Appellant Anita and Respondent Omprakash were to go for honeymoon. He had gone to the house of Shravankumar and he handed over Rs.50,000/- to Shravankumar, at that time Arun i.e. P.W.3 who is brother in law of appellant, was with him. This witness has stated that his father had asked him to give Rs.50,000/- to Shravankumar. Suman Jain has further stated that once at about

2.30 a.m. they received telephone calls from Respondent Omprakash. Omprakash told to take Appellant back to their house. Suman Jain has stated that he immediately informed this fact to Shravankumar on phone. Then, this witness, his father P.W.2 Govind Jain and Shravankumar i.e. the brother of Respondent went to Baroda. On reaching Baroda, they were told that there was nothing serious and phone call was made due to anger. Hence, on the same day, they returned back. On the way, Shravankumar, brother of the Respondent told them that the balance of dowry amount should be paid immediately. This witness was residing at Malad, Mumbai and Shravankumar was residing at Bhayander Mumbai. Suman Jain has further stated that his brother Naresh was bitten by snake. When his sister came with the Respondent to see Naresh, she was weeping. She was also looking weak. On enquiry, Appellant-Anita told him that her husband was beating her. She also told him that she was given insulting treatment. She had further stated that she had attempted to commit suicide. Suman contacted father of Respondent Omprakash. Whereupon, father of Respondent told him that as they had not given money, Anita was beaten by her

husband. This witness also made enquiry with Respondent Omprakash, whereupon he told that he beat Anita because the dowry amount was not paid.

14. On going through the evidence of P.Ws. 1, 2, 3 and 4, we find that all these witnesses have clearly stated about the demand of money and cruelty to Anita on account of non fulfilment of that demand. Specific instances have been stated by Anita. Nothing has been elicited in the cross examination of any of these witnesses so as to disbelieve their testimony on the count of cruelty.

15. The learned Judge of the Family Court has however, observed that there are discrepancies in the evidence of witnesses P.Ws.1 to 4 in relation to the demand for dowry. Some of the witnesses have stated that demand was made after engagement while some of the witnesses have stated that the demand was made before the engagement and hence, the case of the Appellant that demand for dowry, was made, cannot be believed. It is true that there is some slight discrepancy in the evidence of witnesses relating to the actual time when the demand was made. However, on perusal of evidence

of all these four witnesses, we find that the amount of dowry i.e. Rs.10.00 lakhs and the date when demand was made i.e. 31.10.1993 i.e. the day on which the engagement ceremony took place, is consistent. The minor variations relating to the actual time when the demand was made, in our view, is not material and does not damage the case of the Appellant relating to demand of dowry of Rs.10.00 lakhs on the day of the engagement. So also, as far as the instances of cruelty meted out to the Appellant by the Respondent are concerned, she has specifically stated various incidents.

16. The learned Judge of the Family Court, in our view, has misconstrued the evidence of the Appellant wherein she has stated "I had no condition for going back". The learned Family Court Judge has observed that the appellant wanted to stay unconditionally with the respondent. From the statement, in the cross examination of the Appellant, the learned Judge has come to the conclusion that if the Appellant was ill-treated and harassed on account of demand for dowry, she would not readily and willingly want to go back to her husband’s house. In the opinion of the learned

Family Court Judge, this statement by the Appellant in her cross examination falsifies her entire claim of harassment. However, we are unable to agree with the conclusion arrived at by the learned Judge of the Family Court. In our opinion, the statement made by the Appellant shows that she wanted to go back to her husband and live a normal married life. In our view, the statement made by the Appellant in her cross examination does not falsify her claim of harassment. As far as the Indian Society is concerned, normally, married ladies are loathe to break the marriage or cut of the marital ties until and unless they are pushed to the extreme limit. In our view, the learned Judge of the Family Court has also misconstrued the statement of the father of the Appellant P.W.2 Govind Jain wherein he has stated that he would have sent her to the house of Respondent if he had come to take her after "GANGORE" ceremony. So also the statement of this witness wherein he has stated that he had no condition to send the Appellant to her matrimonial house has not been considered in its proper perspective. This statement has been misconstrued by the learned Family Court Judge whereby each of the claim of P.W.2 Govind Jain falsifies the claim

of harassment and cruelty. The father of girl would always want his daughter would go back to the matrimonial house and he would normally not been in a position to mis any of the opportunity for sending his daughter back to the matrimonial home. In our view, statement on the part of the father of the Appellant in no way falsifies the claim of harassment and cruelty.

17. As far as the evidence of the respondent is concerned, he has denied about the demand of dowry, harassment and cruelty to the Appellant. He has denied abusing and beating the Appellant. He has also denied that amount of Rs.50,000/- being given by P.W.4 Suman Jain for honeymoon trip. As stated earlier by us, we have perused the evidence of witnesses i.e. P.Ws. 1 to 4 and we find the evidence to be reliable and trustworthy, hence, we have no hesitation in relying on the evidence of these witnesses as far as the aspect of harassment and cruelty to the appellant by the Respondent for non fulfilment of dowry demand.

18. The evidence of the witnesses that on 19.2.1994 telephone calls were made is corroborated

by the record of MTNL which has been brought on record at Exh.27. This shows that telephone calls were made on that day. So also, boarding tickets of East-West Airlines and Indian Airlines showing that Mr. Govind Jain i.e. father of the Appellant had travelled from Mumbai to Baroda and back to Mumbai on 19.2.1994, have also been brought on record at Exh.26 Colly. These exhibits corroborate the evidence of the Appellant and other witnesses.

19. The Appellant has stated that on 18.1.94 her mother in law had prepared some vegetable. Her mother-in-law put excess salt in it. When the Respondent came at 12.00 O'clock at midnight and had dinner on that day, he threw the said vegetable on the person of the Appellant and said that same should be given to her father. Thereafter, the Respondent assaulted the Appellant and she was driven out of the house at about 2.00 a.m. The Appellant wanted to commit suicide but Kailash brought her back. The Respondent phoned her father and he asked her father to take her away immediately. On the next morning her father P.W.2 Govind and her elder brother came by flight. The Respondent's brother also came alongwith them. The

father of the Appellant asked the Respondent as to why the Appellant wanted to commit suicide. The Respondent said that he should ask that question to the Appellant. The Appellant narrated everything to her father. At that time, the Respondent said that the same thing will happen until the money was given. This evidence of the Appellant is borne out by telephone record as well as Air tickets and boarding passes which have been brought on record. Unless there was something serious, telephone calls would not have been made at such unearthly hours and immediately after that the father of the Appellant and her brother would not rush down to Baroda. This, indeed shows that something serious had happened on the night of 18.1.1994 which resulted in telephone calls being made and the father of the Appellant and her brother rushed down to Baroda by flight. The very fact that they chose to travel by air and did not choose to come by train shows the urgency of situation. Thus, unless there was something serious, the father of the Appellant does not have come rushing down at Baroda by flight. The reason for telephone calls being made have been stated by the appellant. We have no reasons to doubt her evidence/averments. In our

opinion, Exh.26 Colly. and 27 corroborate the evidence of the Appellant.

20. As far as the aspect of maintenance is concerned, the learned counsel for the Appellant on instructions states that the Appellant does not want any maintenance. It is categorically stated there is no demand for maintenance and she will not claim any maintenance against the Respondent. The learned counsel for the Appellant also states on instructions that no claim is being made in respect of jewellery and other belongings of the Appellant which were supposed to be with the Respondent and his family. In view of these statements, we do not think it necessary to go into the issue as to whether maintenance should be awarded and what amount of maintenance should be awarded.

21. It would not be out of place to note that the parties have been staying separately for the last more than ten years and there is every reason to believe that the marriage has reached an irretrievable stage and is a broken marriage.

22. Looking to the evidence on record, in our

considered view, the Appellant has clearly made out a case of cruelty and harassment. In this view of the matter, this appeal succeeds. The judgment and order dated 20.8.2002 passed by the learned Principle Judge, Family Court, Mumbai is hereby set aside. The petition of the appellant is allowed and the marriage is dissolved on the ground of cruelty and the wife is hereby granted divorce on that ground under Section 13(1)(i-a) of Hindu Marriage Act,1955. Appeal is allowed accordingly. The wife has not claimed any maintenance and therefore, she would not be entitled for the same.

. Decree of divorce be drawn accordingly.

(DR. S. RADHAKRISHNAN, J.)

(SMT. V.K. TAHILRAMANI, J.)